



International Journal of Sciences: Basic and Applied Research (IJSBAR)

ISSN 2307-4531
(Print & Online)

<http://gssrr.org/index.php?journal=JournalOfBasicAndApplied>



The Protection of Marine Environment From the Activities in the International Seabed Area and the Responsibility of the Sponsor State

Driss ED-Daran^{a*}, Fatima Ezzohra El Hajraoui^b

^a*School of Law, College of Foreign Student Education, Wuhan University, Wuhan, 430072, Hubei Province, china*

^b*School of Law, Hunan University, Hunan Province, China*

^a Email: ilyass2222@hotmail.com

^b Email: fati_zahra25@hotmail.fr

Abstract

The marine environment issue is one of the biggest subjects of the international law which addressed in many conventions and conferences, the UNCLOS is one Of this Global framework, which tried to provide a comprehensive system for the marine environment protection, But in same time many scholars think that the current systems whether in UNCLOS or other conventions for marine environment protection are not sufficient whether for provide full protection for the marine environment, or for the full and complete compensation about damages, for that many scholars and countries asked to hold new conferences to addressing the responsibility about the marine environment damages. The marine environment protection is international duty which needs good faith and real international cooperation between all the parties, and believing that this environment is global issue, and should take priority in the public policies of the states whether in the national or international level. The activities in the International Seabed Area will be one of biggest challenges for the marine environment as long as these activities have increased, special if the sponsor state has no obligation to share the responsibility with the contractor about the damages, after it takes - what it called- "Necessary and appropriate measures", from other side the lack of clarity in the rules that must be observed might give states the discretion to choose the rules they wish to follow, therefore we can find many states give their sponsorship as what happend for the flag of convenience. The protection duty leads to talk about the responsibility or liability and the compensation about the damages which arising out of the activities in in the Area, and the relations between the state sponsor obligations and the contractor.

KeyWords: Marine Environment; The Area; Responsibility or liability; sponsor state.

Driss ED-Daran, School of Law, Wuhan University, China, (+86) 186 2708 3053 / (+86)130 0713 1565.
E-mail address: ilyass2222@hotmail.com

1.0. Introduction

Recent years have seen an appreciable growth in the level of understanding of the dangers facing the international environment [1]. Therefore the environmental issues occupied privileged position in the consideration of the Global policies, believing that the safe and clean environment is one of human rights, which needs large understanding, and an international cooperation, which could help to establish protection systems for all kinds of the environment. That is what reflect efforts and attempts of states through participating and engaging in many international and regional conferences and conventions.

The UNCLOS provided a system to deal with the marine environment, States shall take, individually or jointly as appropriate, all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source [2] including the activities in the Area.

It is sometimes argued that the appropriate standard for the conduct of states in this field is that of strict liability. In other words, states are under an absolute obligation to prevent pollution and are thus liable for its effects irrespective of fault. While the advantage of this is the increased responsibility placed upon the state [3], it is doubtful whether international law has in fact accepted such a general principle. The leading cases are inconclusive. In the Trail Smelter case Canada's responsibility was accepted from the start, the case focusing upon the compensation due and the terms of the future operation of the smelter, while the strict theory was not apparently accepted in the Corfu Channel case [4].

according to the UNCLOS article 235 the states are responsible for fulfillment of their international obligation related to the marine environment protection and preservation.

threshold and exact content of the obligation, as well as environmental damage should be sufficiently defined. the UNCLOS articles on tackling marine pollution are general and for balancing of interests. when the obligations are balanced against other relevant criteria, it is not possible to define these criteria in order to establish liability [5]. That was more clear in the termination of the SDC's Advisory Opinion on the responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area (1 February 2011).

In this part we will talk about the obligation to protect, control, and prevent, then about the responsibility for the marine environment damages under UNCLOS, also we will talk about the responsibility about the damages arising out of the Activities of the Area, so what are the obligation which needed to protect the marine environment? What are responsibilities about the damages which arising out the activities in the Area?

2.0. The obligation to protect, control, and prevent

According to article 192 of the UNCLOS, states have the obligation to protect and preserve the marine environment. In line with article 194 (2) states shall take all measures necessary to ensure that activities under their jurisdiction or control are conducted in such a manner that they do not cause damage by pollution to other

states and their environment, and that pollution arising from incidents or activities under their jurisdiction or control do not spread beyond the area where they exercise sovereign right. in addition, Part XII on the protection and preservation of marine environment deals with all types of marine pollution. therefore in line with the article 194 (3.c), for example, pollution from installations, and devices used in exploration and exploitation of natural resources of the seabed and subsoil, and the pollution from the installation and devices in the marine environment, as in article 194 (3.d).

according to the article 208 (1) and (3), the pollution from the Seabed activities is subject to national jurisdiction - coastal states shall adopt laws and regulations to prevent, reduce and control pollution of marine environment arising from or in the connection with seabed activities subject to their jurisdiction, such laws, regulations and measures shall be no less effective than international rules, standards and recommended practices and procedures.

according to the article 197, states have the obligation to cooperate in the protection of marine environment, this principle has been expressed in the article 197 of UNCLOS, also the International tribunal for the law of the sea Confirmed on this principle in many cases, for example; case on land reclamation by Singapore in and around the straits of Johor (Malaysia V Singapore) ITLOS said: "the duty to cooperate is a fundamental principle in the prevention of pollution of the marine environment under Part XII of the Convention and general international law and that rights arise therefrom which the Tribunal may consider appropriate to preserve under article 290 of the Convention" [6]. As well as in the MOX plant case (Ireland V. United Kingdom) where the ITLOS stated that: "the duty to cooperation is a fundamental principle in the prevention of pollution of marine environment under Part XII of the Convention and general international law" [7].

The obligation to protect the marine environment as regulated in the UNCLOS represents a codification of customary law, and these articles are supported strongly by opinion juris [8].

The obligation to prevent, control, and reduce is required according to each state's capability, the article 194 (1) of UNCLOS (due diligence), therefore the obligation to take "all measures necessary" is moderated allowing the state to use "best practicable means at their disposal and in accordance with their capability", this make the obligation more flexible to the discretion of the state, however, when it come to the seabed operations law, regulations and measures taken by the coastal state to prevent, reduce, and control pollution shall not be less effective than international rules, as it is stated in article 208 (3) [9].

As for the activities in the international seabed area, the article 145 of UNCLOS states that: "Necessary measures shall be taken in accordance with this Convention with respect to activities in the Area to ensure effective protection for the marine environment from harmful effects which may arise from such activities." And the article 146 stated that "With respect to activities in the Area, necessary measures shall be taken to ensure effective protection of human life". While the article 209 talking about the responsibility and obligation of the states to protect, reduce and prevent the pollution arising out activities of the area undertaken by vessels, installations, structures, and other devices flying their flag or their registry, or operating under their authority,

requirements of such laws, and regulations shall not be less effective than international rules, and regulations and procedures referred to in the article 209 (1) [10].

3.0. Responsibility for the marine environment damages under UNCLOS

According to the Article 235 of UNCLOS, states are responsible for the fulfillment of their international obligations concerning the preservation of the marine environment, this responsibility extends to flag states just as it applies to coastal states in respect of the activities that they permit within their jurisdiction or control [11].

according to the article 235, states should also ensure recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of damage caused by pollution of the marine environment by natural or juridical persons under their jurisdiction [12].

under UNCLOS umbrella, states are provided with some guidance for the control of marine pollution, the UNCLOS does not, however, provide any specific or concise rules on pollution prevention. the UNCLOS articles on tackling marine pollution are too general, and therefore open for balancing of interests. even when the UNCLOS clear, they are not precise enough to survive the interpretation towards balancing between economical needs for example [13]. Furthermore, the lack of clarity in the rules that must be observed might give states the discretion to choose the rules they wish to follow [14].

The UNCLOS does not hold any rules for compensation. Actual liability on the breach of the UNCLOS articles 192 to 194 and 235 (on the different preventive obligations, relating to the protection and preservation of the marine and responsibility and liability) would be difficult to establish as long as states can implement these rules according to their own capability [15].

According to the Article 235 (2), States shall ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of damage caused by pollution of the marine environment by natural or juridical persons under their jurisdiction, in same context, the UNCLOS asks states through the Article 135 (3), to develop their national system on environment responsibility and liability, so that these would cover the damage to the marine environment, also states are obliged to cooperate in the developing the international law related to the responsibility and liability for assessment of and compensation for damage [16].

4.0. Responsibilities about the damages which arising out the Activities in the Area

The responsibility about the marine environment and economical damages which caused by the Activities in the Area is more complicated, because the responsibility in UNCLOS itself not clear.

the Article 139 spoke generally about the responsibility of the state to ensure the that activities in the Area whether carried out by states parties, or state enterprises, or natural or juridical persons which possess the nationality of States Parties or are effectively controlled by them or their nationals, shall be carried out in

conformity with this Part, and same responsibility applies to international organizations for activities in the Area carried out by such organizations.

this article establishes, the liability of states parties, and the international organisations about their activities in the area. also shall entail liability about the damages caused by failure of a state party or international organization to carry out its responsibilities under the part XI of UNCLOS, also this article states that: "States Parties or international organizations acting together shall bear joint and several liability. as stated in the article 139 (2). in same context the State Party shall not be liable for damage caused by any failure to comply with this Part by a person whom it has sponsored under article 153, paragraph 2(b), if the State Party has taken all necessary and appropriate measures to secure effective compliance. states must ensure that their international obligations are respected on their territory. Many treaties require states parties to legislate with regard to particular issues, in order to ensure the implementation of specific obligations [17].

from other side this article tried to Framing the responsibility of any state sponsor in taking all necessary and appropriate measures to secure effective compliance, but what is the real meaning of the "all necessary and appropriate measures to secure effective compliance" which is unclear, and inscrutable.

The lack of the clarity pushed to look for advisory opinion of the *Seabed Dispute Chamber* of the *ITLOS* about *Responsibilities And Obligations Of States Sponsoring Persons And Entities With Respect To Activities In The AREA. Under 3 Questions:*

- 1. What are the legal responsibilities and obligations of States Parties to the Convention with respect to the sponsorship of activities in the Area in accordance with the Convention, in particular Part XI, and the 1994 Agreement relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982?*
- 2. What is the extent of liability of a State Party for any failure to comply with the provisions of the Convention, in particular Part XI, and the 1994 Agreement, by an entity whom it has sponsored under Article 153, paragraph 2 (b), of the Convention?*
- 3. What are the necessary and appropriate measures that a sponsoring State must take in order to fulfil its responsibility under the Convention, in particular Article 139 and Annex III, and the 1994 Agreement? Agreement, by an entity whom it has sponsored under Article 153, paragraph 2 (b), of the Convention?*

SDC's Advisory Opinion on the responsibilities and obligations of States sponsoring persons and entities with respect to activities in the Area (1 February 2011), which First decision of the SDC of ITLOS and the first advisory opinion submitted to it by the Council of the ISA. The SBC states that The key provisions concerning the obligations of the sponsoring States are: article 139, paragraph 1; article 153, paragraph 4 (especially the last sentence); and Annex III, article 4, paragraph 4, of the Convention (especially the first sentence).

❖ **The SDC ruled, inter alia, the following:**

As For Question 1. Legal responsibilities and obligations of States Parties to UNCLOS and the implementation agreement of Part XI, with respect to the sponsorship of activities in the Area, sponsoring States have two kinds of obligations:

1. The obligation to ensure compliance “due diligence” by sponsored contractors with the contract and UNCLOS and related instruments [18]. This may require measures within the legal system.
2. Direct obligations with which sponsoring States must comply independently: the obligation to assist the Authority; precautionary approach; application of “best environmental practices”; recourse for compensation [19].

Having recognized that this provision contains an “obligation to ensure,” the Chamber, in what is from an environmental law perspective possibly the strongest part of the opinion, itemized the constituent elements of this obligation, pointing out that this is an obligation of conduct rather than of result, i.e., it is not an obligation that requires the contractor’s compliance in every case. It is analogous to the obligation of due diligence and conduct that the International Court of Justice found in the recent Pulp Mills Case on the River Uruguay (Arg. v. Uru.), Judgment, 187 (Apr. 20, 2010) [20]. International environmental lawyers will most welcome elements of the requirements of “due diligence.” Recognizing that “due diligence” may impose more rigorous requirements for riskier activities, the Chamber first identified what it termed the “legal obligation” to apply the precautionary approach as found in Principle 15 of the Rio Declaration. Precaution is recognized by the ISA Nodules and Sulphides Regulations, but the Chamber went further, seeing this as “an integral part of the due diligence of sponsoring states which is applicable even outside the scope of the regulations”, requiring actions where scientific evidence is insufficient but “there are plausible indications of potential risk”. Perhaps most significantly, the Chamber recognized “a trend towards making this approach part of customary international law”, which it sees in the Pulp Mills Case and which this opinion of course further supports.

Other due diligence elements include “best environmental practices,” which are required by the ISA regulations and the Standard Clauses for exploration contracts. Technical and financial guarantees by a contractor, as well as the availability of financial recourse for prompt and effective compensation in the event of damage caused by marine pollution, are also included, as are requirements for Environmental Impact Assessment (“EIA”), which the Chamber found extended beyond the scope of the ISA Regulations.

On the wider and controversial question of the treatment of developing states, the Chamber unequivocally endorsed the principle of equality, recognizing that the spread of sponsoring states “of convenience” (similar to flags of convenience for ships) would jeopardize the application of the highest standards of protection [21].

As For Question 2. The extent of liability of a State Party for any failure to comply with UNCLOS and the implementation agreement of Part XI, by an entity whom it has sponsored. Regarding question 2, the SDC established:

1. The liability of the sponsoring State arises from its failure to fulfil its obligations under UNCLOS and related instruments. Failure of the sponsored contractor does not in itself make the sponsoring State liable [22].
2. To make a sponsoring State liable a causal link between its failure and damage caused by the sponsored contractor's failure is required, and cannot be presumed. Sponsoring State is absolved if it has taken "all necessary and appropriate measures to secure effective compliance" by the sponsored contractor with its obligations.
3. This exemption does not apply to the failure of the sponsoring State to carry out its direct obligations, for the liability of the sponsoring State and that of the sponsored contractor exist in parallel and are not joint and several.
4. The rules on liability set out in UNCLOS and related instruments are without prejudice to the rules of international law. If the sponsoring State has failed to fulfil its obligation but no damage has occurred, the consequences are determined by customary international law.

Arguably, this question formed the basis for the most important part of the opinion, but is also the one for which the 1982 Convention provides the clearest answer. Article 139(2) specifies that "without prejudice to rules of international law . . . damage caused by the failure of a state party . . . to carry out its responsibilities under this Part shall involve liability". However, it goes on to say that a "State Party is not liable for damage caused by a failure to comply . . . by a person whom it has sponsored . . . if the State Party has taken all necessary and appropriate measures to secure effective compliance . . .". These measures are elaborated as the requirements that the "State Party has adopted laws and regulations and taken administrative measures which are, within the framework of its legal system, reasonably appropriate for securing compliance by persons under its jurisdiction".

Therefore, this provision acknowledges the principle that the a state is responsible for its international unlawful acts, which here the failure to secure compliance by its contractor through law and regulations and appropriate administrative measures. There is a burden of proof on the Authority to show unreasonable measures on the part of the state [23].

The Chamber ruled that this was a high standard of due diligence for sponsoring states. However, given the explicit text of the Convention, it was not a strict liability regime, despite arguments to the contrary. But if damage occurred, and the sponsoring state had failed to take "all necessary and appropriate measures to ensure compliance" by its contractor, then the state would be liable. Moreover, the Chamber pointed out that nothing would prevent such liability from being introduced in the future through the mining regulations or the establishment of a trust fund to cover damage not covered by the Convention [24].

As For Question 3. Necessary and appropriate measures that a sponsoring State must take in order to fulfill its responsibility under UNCLOS and the implementation agreement of Part XI.

UNCLOS requires the sponsoring State to adopt laws and regulations and to take administrative measures that have two distinct functions: to ensure compliance by the contractor with its obligations and to exempt the sponsoring State from liability.

The scope and extent of these laws and regulations and administrative measures depends on the legal system of the sponsoring State,

Laws and regulations and administrative measures should be in force at all times that a contract with the ISA is in force. Their existence is not a condition for concluding the said contract, but is a necessary requirement for carrying out the obligation of due diligence of the sponsoring State and for seeking exemption from liability. It is inherent in the “due diligence” that the obligations of a sponsored contractor are made enforceable.

The sponsoring State cannot be considered as complying with its obligations only by entering into a contractual arrangement with the contractor.

The sponsoring State does not have absolute discretion in the adoption of laws and regulations; it must act in good faith, in the benefit of mankind as a whole.

These measures cannot simply be contractual arrangements with the sponsored entity. They must be at least as stringent as those adopted by the Authority and certainly no less effective than international rules [25].

This advisory opinion is a historic ruling. The Chamber’s unanimous opinion sets the highest standards of due diligence and endorses a legal obligation to apply precaution, best environmental practices, and EIA. Some commentators will be disappointed that the Chamber did not take the view that sponsoring states are strictly liable for the actions of their sponsored entities. However, the wording of the Convention itself weighs heavily against this conclusion. Moreover, the Chamber does suggest that a strict liability regime could be introduced via the ISA Mining Regulations and suggests the use of a trust fund to address residual liability issues. Crucially, it also rules that developing countries have the same obligations regarding environmental protection as developed countries. It not only warns of the risk that differentiated lower standards might result in the emergence of the equivalent of flags of convenience - so called “sponsoring states of convenience” - but also goes a long way in preventing that from happening [26].

5.0. The responsibility of the Contractor about his activities which may affect or cause damages to the others interests.

The article 22 of the annex 3 of UNCLOS stipulate that: “ the contractor shall have responsibility or liability for any damage arising out of wrongful acts in the conduct of its operations,...”. Here this article just mentioned the responsibility about his wrongful acts, so what about the damages arising out of the lawful acts? also the responsibility about the damages which need more than the Capabilities of the contractor, in the future we will find many damages which will need more than 100 million USD for reforming, especially the damages which arising out because the exploitation of the oil and gas in the Area, in this context same article stipulate that: “...

liability in every case shall be for the actual amount of damage”. The problem in the determine the responsibility not just about the lack of the full and complete compensation in some cases, but also in how to prove this responsibility, especially prove the damage, which needs many conditions to prove it. These issues show that the UNCLOS needs more amendments in this respect.

The contractor has full responsibility about the damages which caused by his wrongful acts, these damages may will happened in the high seas or could touch the interests of states in the EEZ, in the last case, the damage will be direct to certain states, sometimes the damage and the compensation will be more than the capability of some contractors, also sometimes the damage could be continual, therefore the determination of compensation will not be reasonable and impartial.

Front of this situation the Compulsory insurance should be one of the Necessary requirements in the Qualifications of applicants before starting the Exploration and exploitation of the international seabed area, from other side the sponsor state should bear Partial and Supplementary responsibility about the damages and compensations which may will be more than the capability of the contractor , also when the contractor can not be able to fulfil his obligations, and this sponsor should treat as third party in the conflict or dispute and as and as guarantor in the case of inability or failure of the contractor, otherwise we will find many sponsors as “sponsoring states of convenience” [27], as we found many flag convenient states.

6.0. Conclusion

The marine environment protection from the activities of the International Seabed Area is important issue which needs more work and efforts, to provide successful Global system for this Protection, whether by precautionary protection before the damage, through adopting laws and regulations and taken administrative measures which are, within the framework of its legal system, reasonably appropriate for securing compliance by persons under its jurisdiction. and participating in the international cooperation to protect, control, and prevent the pollution which arise from the Activities of the Area, or by Subsequent protection, means after the damage, through the cooperation, and adopt comprehensive system for the responsibility and the compensation.

the responsibility of the sponsor state, and to prove its failure is one of the disadvantages of the Law of the Sea which need changes.

from other side the sponsor states should bear part of the responsibility of the contractor about the damages, otherwise we will find a new system recognizing that the spread of sponsoring states “of convenience” same as the flags of convenience for ships.

For these reasons the International Seabed Authority should to ask for hold new conference to deal with marine environment protection, and the responsibility for the damages, to find full protection for this environment, and provide full and complete compensation about damages.

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